

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Richard H. Tholen, M.D.,

Civil No. 17-3919 (DWF/SER)

Plaintiff,

v.

ORDER

Assist America, Inc.,

Defendant.

This matter is before the Court upon Defendant Assist America, Inc.’s (“Defendant”) appeal (Doc. No. 97) of Magistrate Judge Steven E. Rau’s August 13, 2018 Order (Doc. No. 95). On September 7, 2018, Plaintiff Richard H. Tholen, M.D. (“Plaintiff”) filed a Response in Opposition to Defendant’s Objection to August 13, 2018 Order (Doc. No. 115) and a Declaration of Patrick M. Arenz in Support of Plaintiff’s Response in Opposition to Defendant’s Objection to August 13, 2018 Order (Doc. No. 116). The Court must modify or set aside any portion of the Magistrate Judge’s order found to be clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Local Rule 72.2(a). This is an “extremely deferential standard.” *Reko v. Creative Promotions, Inc.*, 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999). “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Chakales v. Comm’r of Internal Revenue*, 79 F.3d 726, 728 (8th Cir. 1996) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

In his Order, the Magistrate Judge granted Plaintiff's renewed motion for leave to amend the Complaint to assert punitive damages. In so doing, the Magistrate Judge explained that, given the current state of Minnesota law, the Court cannot conclusively determine that it is clear that no relief could be granted under any set of facts. The Magistrate Judge noted Plaintiff's allegations that Defendant's representatives misrepresented themselves as physicians, Defendant failed to obtain medical records from the Mexican hospital that would allow it to make an informed choice regarding Plaintiff's medical care, and that the proper clinical directors were not contacted or declined to review Plaintiff's medical case in a timely fashion. The Magistrate Judge found that these allegations, if proven true, plausibly allege that Defendant was both negligent in the provision of medical services and willfully disregarded Plaintiff's rights under its care and, therefore, the amendment to add a punitive damages claim was not futile. The Magistrate Judge also noted that a more thorough briefing could lead to the conclusion that Plaintiff's punitive damages claim is foreclosed but concluded that the issue is best left for summary judgment where the Court will benefit from a fully developed factual record and more fulsome briefing on the relevant legal issue.

Defendant objects to the Magistrate Judge's order, arguing that it is contrary to law because it fails to apply Minnesota law, which requires a plaintiff to submit affidavits showing the factual basis for its claim as a condition precedent to asserting a punitive damages claim. Defendant also asserts that the order is contrary to law because it did not properly consider the evidence. Finally, Defendant argues that Plaintiff's claim for

punitive damages is futile when considering only the four corners of the amended complaint and referenced exhibits. Plaintiff responds that the Court should summarily overrule Defendant's objection because Defendant waived its objection and failed to disclose important authority to the Court. Moreover, Plaintiff argues that Defendant has failed to show that the Magistrate Judge was clearly erroneous or contrary to law when he applied Rule 15's plausibility standard.

The Court has carefully considered the parties' arguments and finds that Magistrate Judge Rau's August 13, 2018 Order is neither clearly erroneous nor contrary to law. Accordingly, the Court overrules Defendant's objection and affirms Magistrate Judge Rau's August 13, 2018 Order in all respects. In so ruling, the Court notes that it agrees that the issue will be more appropriately considered on summary judgment.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant Assist America Inc.'s appeal (Doc. No. [97]) of Magistrate Judge Steven E. Rau's August 13, 2018 Order is **OVERRULED**.
2. Magistrate Judge Steven E. Rau's August 13, 2018 Order (Doc. No. [95]) is **AFFIRMED**.

Dated: October 17, 2018

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge